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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF NEW YORK,
Petitioner,

- v -

ALFONSO OWENS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE APPELLATE DIVISION, FIRST DEPARTMENT

Attorney for Petitioner

ROBERT M. MORGENTHAU
District Attorney, New York County
One Hogan Place
New York, New York 10013
(212) 335-9000

By: Mark Ryan Dwyer
Counsel of Record
Paul Harnisch
Arthur D. Middlemiss
Assistant District Attorneys
Of Counsel

22 pp

QUESTION PRESENTED

When the evidence on appeal is found insufficient to prove an aggravating element of an offense, and the conviction may not simply be reduced to one for a lesser included offense solely because of an unrelated trial error, does the Double Jeopardy Clause of the United States Constitution bar retrial of the defendant on the lesser included offense?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner the State of New York respectfully requests this Court to issue a writ of certiorari to review the final decision of the New York State Supreme Court, Appellate Division, First Department, entered on May 21, 1996.

OPINION BELOW

The opinion of the New York State Appellate Division, First Department, dated May 21, 1996, concluding that the Double Jeopardy Clause of the United States Constitution prohibited Owens's criminal prosecution is reported at ___ A.D.2d ___, 642 N.Y.S.2d 874 (N.Y.App.Div. 1996).

JURISDICTION

The Order of the New York State Court of Appeals denying discretionary review of the order of the New York State Supreme Court, Appellate Division, First Department was entered on August 1, 1996. This Court's jurisdiction is being invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution, provides, in pertinent part:

> ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ....

Amendment XIV, Section 1, of the United States Constitution, provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

A. The Events Leading to the Conviction

Respondent Alfonso Owens was charged with first degree robbery after robbing a Manhattan bar. In November 1991, Owens, represented by counsel, proceeded to a jury trial presided over by Justice Felicia Shea, and was convicted as charged.

B. Owens's Direct Appeal

On direct appeal to the Appellate Division, defendant argued successfully that the proof of the aggravating element for first degree robbery -- that he had displayed what appeared to be a firearm during the robbery -- had been legally insufficient. While agreeing with Owens's contention, the Appellate Division specifically stated that, since third degree robbery *had* been clearly proven beyond a reasonable doubt, it would simply have modified the conviction to that of a lesser included offense but for a trial error -- the prosecutor had violated the trial court's ruling regarding the scope of cross-examination about defendant's criminal history. Since Owens was entitled to a new, error-free trial on the lesser-included offense, the court remanded to permit the prosecutor to obtain an indictment for third degree robbery. *People v. Owens,* 203 A.D.2d 106, 107, 610 N.Y.S.2d 485 (N.Y. App. Div. 1996).

C. Dismissal of the New Indictment

The State of New York subsequently obtained a new indictment charging Owens with two counts of third degree robbery. Owens then moved successfully before the trial court to dismiss the newly-obtained indictment on double jeopardy grounds. The Appellate Division upheld the lower court's holding that re-presentation of the lesser included offense was barred on that ground. The court reasoned that its

"insufficiency finding on the first-degree robbery charge was tantamount to an acquittal (*Burks v. United States*, 437 U.S. 1, 16) and the lesser included third-degree robbery charge was the 'same offense' as first-degree robbery for double jeopardy purposes, thus barring a re-trial (*United States v. Dixon*, ___ U.S. ___, 113 S.Ct. 2849, 2856, citing *Brown v. Ohio*, 432 U.S. 161)." *People v. Owens*, ___ A.D.2d at ___, 642 N.Y.S.2d at 874.

REASONS FOR GRANTING THE WRIT

The writ should be granted because a fundamental split exists among several states, and within New York itself, as to the controlling issue: whether double jeopardy principles permit retrial of a defendant whose conviction has been reversed for insufficiency of an aggravating element of the crime, if a lesser included crime had been proved beyond a reasonable doubt. While the New York State Appellate Division concluded in this case that defendant cannot be re-tried, several states, and in fact New York's highest court, have concluded that re-trial under these circumstances would not violate the double jeopardy clause. Thus, under the various interpretations of the double jeopardy clause existent in the states, Owens can evade punishment for a crime in New York that the State proved he committed, while in other states he could be re-tried for that offense.

The issue of whether an appellate reversal for insufficiency of the evidence of an aggravating element bars

retrial for lesser included offenses that *were* sufficiently proven at a first trial is one this Court has never explicitly addressed, but is of great significance. Under settled double jeopardy principles, the general rule is that a reversal on appeal is *not* the equivalent of a jury acquittal for double jeopardy purposes, and that a reversal thus permits the defendant's retrial. *See Lockhart v. Nelson*, 488 U.S. 33, 38 (1988). But that rule does not apply when a reversal is for the legal insufficiency of the evidence of the charged offense and its lesser offenses at the first trial.

The theory underlying that exception to the rule is that the government should have one fair chance to present legally sufficient evidence, and that if it fails to do so, double jeopardy bars retrial. For instance, in *Burks v. United States*, 437 U.S. 1 (1978), the government failed to prove the defendant's sanity beyond a reasonable doubt at his first trial, and thus his guilt of any offense. Such an evidentiary insufficiency, of course, precluded the defendant's retrial for any offense. *Id.* at 3-4, 10-11.

The exception, however, should not apply where the evidentiary insufficiency found on appeal extends only to an aggravating element of the crime. In that case, as here, the government *has* proven every element of the lesser included offense beyond a reasonable doubt, so retrial on the lesser charge with respect to *that* offense does not implicate double jeopardy concerns.

That conclusion makes perfect sense. After all, it is well settled in both federal and state courts that, consistent with double jeopardy concerns, appellate courts "may direct the entry of judgment for a lesser included offense when a

conviction for a greater offense is reversed on grounds that affect only the greater offense." *Rutledge v. United States*, ___ U.S. ___, 116 S.Ct. 1241, 1251, 134 L.Ed 2d 419 (1996); *see also State v. Malufau*, 906 P.2d 612, 621, 80 Haw. 126 (Hawaii 1995)(collecting state cases); 3 W. LaFave & J. Israel, *Criminal Procedure* § 24.4, at 91-92 (1984). That approach recognizes that, had the trial court properly charged the jury, the greater offense would never have gone to the jury for the evidence was insufficient as a matter of law to support a conviction for that offense. Therefore, modification of the judgment of conviction by the appellate court to that of a lesser included offense puts the defendant in the same position he would have been in if the trial court had not erred the first place.

If modification is permitted in such a case, then a retrial should be permissible here. The only difference between simple modification of a judgment to that of a lesser included offense, and the instant case, is that a retrial is given to the defendant for a trial error, exposing him at most to the charge that, in a case like *Rutledge*, would be deemed already proved. As noted by one commentator,

> it would seem to follow that if the appellate court has also found some error in the trial [in addition to a determination that insufficient evidence to support a conviction for the greater offense was presented], then it is proper to remand the case for

> retrial on the lesser included offense.

3 W. LaFave & J. Israel, *Criminal Procedure*, § 24.4, at 91-92 (1984) (footnotes omitted). Other federal and state courts have likewise approved procedures that would not, as the New York decision does, insulate one like Owens from prosecution for an offense that there can be no doubt that he committed. *See Beverly v. Jones,* 854 F.2d 412, 416, *reh'g denied*, 861 F.2d 727 (11th Cir. 1988), *cert. denied*, 490 U.S. 1082, 109 S.Ct. 2104, 104 L.Ed.2d 665 (1989); *Dickinson v. Israel,* 482 F.Supp. 1223, 1226 (E.D.Wis. 1980), *aff'd on opinion below*, 644 F.2d 308 (7th Cir. 1981); *State v. Malufau,* 906 P.2d at 622; *State v. Maupin,* 859 S.W.2d 313, 317-18 (Tenn. 1993); *State v. O'Brien,* 857 S.W.2d 212, 221 (Mo.Banc 1993); *Gorham v. Commonwealth,* 426 S.E.2d 493, 496-97, 15 Va.App. 673 (Va.App. 1993); *State v. Garcia,* 837 P.2d 862, 869, 114 N.M. 269 (N.M. 1992); *State v. Alston,* 216 S.E.2d 416, 418-19, 26 N.C.App. 418 (N.C.App.Ct. 1975).

Indeed, New York's own confusion on this issue warrants this Court's assistance. For example, in *People v. Ryan,* 82 N.Y.2d 497, 605 N.Y.S.2d 235, 626 N.E.2d 51 (1993), the New York Court of Appeals held that the evidence presented at trial was insufficient to prove the aggravating element of attempted criminal possession of a controlled substance in the second degree -- that the defendant had known the specific weight of the drugs in his possession. *Id.* at 506-507, 605 N.Y.S.2d at 240-41, 626 N.E.2d at 56-57. The Court of Appeals also held that the trial court had committed reversible error by improperly denying the

defendant's request to represent himself. *Id.* at 507-508, 605 N.Y.S.2d at 241, 626 N.E.2d at 57.

Under those circumstances, however, the Court of Appeals did not, as the Appellate Division's decision would seemingly mandate, reverse the conviction and dismiss the case on double jeopardy grounds. Rather, the remedy fashioned by the Court of Appeals in *Ryan* was to grant the government leave to retry the defendant on the lesser included offense that was proved at trial. Other New York courts have likewise fashioned the exact same remedy found by the Appellate Division to violate the double jeopardy clause in the instant case. *See, e.g., People v. Youngblood,* 210 A.D.2d 948, 621 N.Y.S.2d 988 (N.Y.App.Div. 1994); *People v. Sanchez,* 209 A.D.2d 265, 618 N.Y.S.2d 718 (N.Y.App.Div. 1994); *People v. Robare,* 109 A.D.2d 923, 925, 486 N.Y.S.2d 393 (N.Y. App.Div. 1985).

Unaccountably, Owens's position finds support in cases from Florida, Texas and Alabama. Those jurisdictions have concluded that the state's right to retry a defendant for a lesser included offense hinges on whether the lesser offense was expressly submitted to the jury at the defendant's first trial. *See Ex Parte Roberts,* 662 So.2d 229, 232 (Ala. 1995); *Granger v. State,* 850 S.W.2d 513, 519-520 (Tex. Crim. App. 1993); *Webster v. State,* 549 So.2d 784, 785 (Fla.App.2 Dist. 1989). Of course, that position makes no sense, for if the jury finds the defendant guilty of the aggravated offense, it must by definition have also found the defendant guilty of the lesser crime, whether or not it has said so expressly. *See, e.g., State v. Maupin,* 859 S.W.2d at 316-317. That the confusion exists,

of course, merely underscores the need for this Court to resolve this important and recurring issue once and for all.

* * * * *

The result reached by the Appellate Division here would allow a criminal defendant completely to escape liability for an offense on account of the legal quirk that his trial contained both an evidentiary sufficiency problem that could normally be remedied simply by appellate modification, and an otherwise unforeseen trial error that could normally be remedied by a retrial. Yet, in several other states, the federal constitution has been found to allow a retrial on a lesser charge under such circumstances. Thus, in New York, a defendant stands immunized from prosecution for a serious crime that he undoubtedly committed, while in other states, the prosecution could go forward. For that reason, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
One Hogan Place
New York, New York 10013
(212) 335-9000

By: Mark Ryan Dwyer
Counsel of Record
Paul Harnisch
Arthur D. Middlemiss
Assistant District Attorneys
Of Counsel

December 9, 1996

App. 1

PEOPLE OF THE STATE OF NEW YORK,
Appellant,

- v -

ALFONSO OWENS,
Defendant-Respondent.

Cal. No. 93-11524

New York State Supreme Court
Appellate Division
First Department.

May 21 1996

Order, Supreme Court, New York County (Alvin Schlesinger, J.), entered November 16, 1994, dismissing the indictment, unanimously affirmed.

During defendant's first trial, the jury was not charged on any lesser included offense. After his conviction on the sole count of the indictment charging first-degree robbery, defendant appealed to this Court seeking a new trial due to a *Sandoval* error and dismissal of the indictment due to insufficient evidence. After finding there was a *Sandoval* violation and that the evidence was insufficient with respect to the greater charge, but sufficient as to third-degree robbery, this Court reversed the conviction, but granted the People leave to re-present the lesser charge (203 AD2d 106, *lv denied*

84 NY2d 871). Upon his re-indictment for third-degree robbery, defendant moved to dismiss the new indictment on double jeopardy grounds.

The hearing court correctly dismissed the indictment since this Court's insufficiency finding on the first-degree robbery charge was tantamount to an acquittal (*Burks* v *United States*, 437 US 1, 16) and the lesser included third-degree robbery charge was the "same offense" as first-degree robbery for double jeopardy purposes, thus barring a retrial (*United States v Dixon*, 113 S Ct 2849, 2856, *citing Brown v Ohio*, 432 US 161).

The husband and wife owners were present during the robbery of their bar. The original indictment filed by the People pertained solely to the wife. Since the People had sufficient evidence with which to proceed on an indictment against defendant with respect to the robbery of the husband, the court correctly dismissed the first count of the new indictment pertaining to the husband (CPL 40.40[2]).

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

- v -

ALFONSO OWENS
Defendant-Appellant,

Cal. No. 95-223

New York State Supreme Court
Appellate Division
First Department.

April 19, 1994.

Judgment of the Supreme Court, New York County (Felice Shea, J.), rendered December 10, 1991, convicting defendant, after jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to an indeterminate term of imprisonment of from 6 to 12 years, unanimously reversed, on the law, with leave to re-present the charge of robbery in the third degree to a Grand Jury.

Defendant was convicted of first degree robbery under a single-count indictment. The crime occurred on January 23, 1990 at approximately 2:00 A.M. in the bar owned by complainants. An owner identified defendant from a photograph and at two separate line-ups.

At issue on this appeal is whether the prosecutor's failure to abide by the court's Sandoval ruling requires reversal and whether the record supports the conviction for robbery in the first degree.

The Sandoval ruling restricted inquiry into a 1987 attempted burglary conviction, obtained upon defendant's guilty plea, and the underlying facts thereof. The prosecution, however, went beyond the scope of the ruling by cross-examining defendant about charges which arose as a result of stolen credit cards and marijuana found on his person at the time of his arrest. Defendant's possession of these items was not relevant to any element of the crime to which his conviction relates. It was not asserted that the items were taken in the course of the burglary and, thus, their possession was not part of the underlying facts of that crime. By permitting the prosecutor to inquire into other crimes over defense objection, the court altered its Sandoval ruling to defendant's prejudice.

The purpose of a Sandoval ruling is to provide a defendant with "definitive advance knowledge of the scope of cross-examination as to prior conduct to which he will be subjected" should he testify (*People v Sandoval,* 34 NY2d 371, 375). Having received a determination limiting inquiry, "defendant then had a right to rely on the court's ruling when he took the witness stand and to expect that the court would not permit cross-examination to extend to matters apparently precluded by the ruling" (*People v Aponte,* 168 AD2d 274, 275). By allowing cross- examination into possessory crimes having no relation to the attempted burglary, the court

deprived defendant of his right to make an informed decision about giving testimony (*see, People v Durham*, 154 AD2d 615, 616).

We also find that the evidence is insufficient to sustain conviction for robbery in the first degree. The court precluded the People from examining the complaining witness on the question of whether defendant threatened use of a firearm during the course of the robbery, specifically whether she subjectively perceived that he was armed. Thus, an element of the crime—that defendant employ a firearm or what appears to be a firearm—is not supported by the record, and the verdict cannot be sustained. The evidence is, however, sufficient to sustain a conviction for robbery in the third degree, to which we would reduce the verdict were it not for the Sandoval error.

Concur—Murphy, P. J., Sullivan, Ross, Rubin and Tom, JJ.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

- v -

ALFONSO OWENS
Defendant-Respondent,

In re New York County Indictment No. 94-5064

New York State Court of Appeals
Certificate Denying Leave
August 1, 1996

BEFORE: HON. CARMEN BEAUCHAMP CIPARIK

I, CARMEN BEAUCHAMP CIPARIK, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question

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*Description of Order: Order of the Appellate Division, First Department, entered May 21, 1996, affirming an order of the Supreme Court, New York County, entered November 16, 1994.

of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated at New York, New York
August 1, 1996

/s/ Carmen Beauchamp Ciparik
Associate Judge

(2)

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96-967
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STATE OF NEW YORK,

Petitioner,

- v. -

ALFONSO OWENS,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE APPELLATE DIVISION,
FIRST DEPARTMENT

RICHARD M. GREENBERG, ESQ.
Counsel of Record
Office of the Appellate Defender
45 West 45th Street, 7th Floor
New York, New York 10036
(212) 719-0766
Attorney for Respondent

By: Jeffrey A. Udell, Esq.
Of Counsel

April 4, 1997

2/12

96-967
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF NEW YORK,

Petitioner,

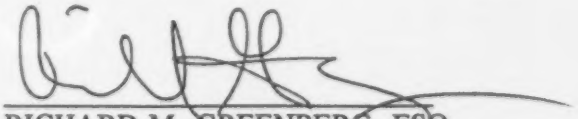
- v. -

ALFONSO OWENS,

Respondent,

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Alfonso Owens, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari, and to proceed in forma pauperis. Respondent has been granted leave to so proceed in the Supreme Court of the State of New York, in the Appellate Division of the Supreme Court of the State of New York, and in the Court of Appeals of the State of New York. Respondent's declaration in support of this motion is attached hereto.



RICHARD M. GREENBERG, ESQ.
Attorney for Respondent

DECLARATION

I, Alfonso Owens, do hereby declare and state that I am the Respondent in the above-entitled case; that in support of my motion to proceed as a poor person, I state that because of my poverty I am unable to pay the costs of said case; and that I believe I am entitled to redress.

I further state that the statements which I have made below relating to my ability to pay the cost of proceeding in this Court are true.

1. I am presently employed. I earn approximately $850 per month. I work at S&S Apparel Corp., 225 W. 35th St., New York, NY 10001.

2. I have not received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or any other like source.

3. I have no cash reserves, nor do I have a checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or any other valuable property.

5. There are no persons who are dependent upon me for support.

I declare under penalty of perjury that the foregoing is true and correct.

4/2/97
Date

Alfonso Owens
Alfonso Owens

No. 96-967

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF NEW YORK,

Petitioner,

- v. -

ALFONSO OWENS,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE APPELLATE DIVISION,
FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD M. GREENBERG, ESQ.
Counsel of Record
Office of the Appellate Defender
45 West 45th Street, 7th Floor
New York, New York 10036
(212) 719-0766
Attorney for Respondent

By: Jeffrey A. Udell, Esq.
Of Counsel

April 4, 1997

COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Court issue a writ of certiorari to review a determination of an intermediate state court holding, consistent with every state or federal appellate court that has ever directly addressed the question, that where a defendant's conviction is reversed on appeal due to legally insufficient evidence of the only offense charged to the jury, the Double Jeopardy Clause of the United States Constitution bars retrying the defendant for any lesser-included offense?

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COUNTER-STATEMENT OF THE CASE

A. Introduction

By a single-count indictment alleging robbery in the first degree, see N.Y. Penal Law § 160.15(4) (McKinney 1988), Alfonso Owens was charged with the robbery of a Manhattan bar. After trial, Mr. Owens was convicted of first-degree robbery -- the only offense that the prosecution elected to submit to the jury. On appeal, the Appellate Division reversed the conviction, holding that the evidence was legally insufficient to support that charge. People v. Owens, 203 A.D.2d 106, 610 N.Y.S.2d 485 (N.Y. App. Div.), leave denied, 84 N.Y.2d 871, 618 N.Y.S.2d 16 (1994).

Thereafter, Mr. Owens was reindicted and charged with the very same conduct at issue in the earlier trial. The second indictment, however, alleged not first-degree robbery, but its lesser-included offense of robbery in the third degree. See N.Y. Penal Law § 160.05 (McKinney 1988). After the trial court dismissed this indictment on double jeopardy grounds, the Appellate Division affirmed, People v. Owens, ___ A.D.2d ___, 642 N.Y.S.2d 874 (N.Y. App. Div. 1996), and the Court of Appeals declined to grant leave, People v. Owens, 88 N.Y.2d 991, 649 N.Y.S.2d 398 (N.Y. 1996). The state now petitions this Court for a writ of certiorari.

B. The First Indictment and Appeal

At trial upon the first indictment, after the court invited the parties to submit any "requested charges" to the jury, the prosecutor declined to request that the jury be charged on the lesser-included offense of robbery in the third degree. Thus, in its deliberations, the jury was faced with just two choices: it could convict Mr.

Owens of robbery in the first degree or it could acquit him outright. The jury ultimately found Mr. Owens guilty of first-degree robbery -- the only offense it considered.

On appeal, the Appellate Division found that the evidence at trial was "insufficient to sustain the conviction for robbery in the first degree." 203 A.D.2d at 107, 610 N.Y.S.2d at 487. Because "an element of the crime -- that defendant employ a firearm or what appears to be a firearm -- [was] not supported by the record," the court held that the jury's verdict could not be sustained. Id. Without considering the double jeopardy implications of its ruling, however, the court opined that the evidence at trial was "sufficient to sustain a conviction for robbery in the third degree," id., and granted the state "leave to re-present the charge of robbery in the third degree to a Grand Jury," id. at 106, 610 N.Y.S.2d at 486.

C. The Second Indictment and Appeal

Based on precisely the same conduct as was alleged in the first prosecution, Mr. Owens was reindicted and charged with the crime of robbery in the third degree. Thereafter, he moved to dismiss on both state and federal double jeopardy grounds. Had the jury acquitted him of first-degree robbery, Mr. Owens argued -- the only charge that the prosecutor elected to submit -- the state would have been precluded from later prosecuting him for the lesser-included offense of third-degree robbery. See Brown v. Ohio, 432 U.S. 161, 168 (1977) (lesser-included offense considered "same offense" for double jeopardy purposes as its greater-inclusive offense). Moreover, he argued, the Appellate Division's holding, that the evidence was legally insufficient to support the only charge submitted to the jury, was

tantamount to acquittal of that offense within the meaning of double jeopardy law. See Burks v. United States, 437 U.S. 1, 19 (1978). Therefore, just as a jury verdict finding Mr. Owens not guilty of first-degree robbery would have barred further prosecution for the "same offense" of third-degree robbery, so too was the effect of the Appellate Division's finding that the evidence of first-degree robbery was legally insufficient.

The trial court granted Mr. Owens's motion to dismiss on those grounds. The Appellate division affirmed, and the Court of Appeals denied leave.

REASONS FOR DENYING THE WRIT

This Court should not grant a writ of certiorari because there is no split of authority with respect to the issue raised in this case. While the petition invokes the specter of a "fundamental split" among the several states, Pet. 4, petitioner fails to cite a single authority that both directly addresses the issue at stake here and resolves it in a way different from that of the courts below. This is not surprising, however, because the decision in this case squarely conforms with bedrock principles of double jeopardy law. Moreover, the issue raised is one that does not arise frequently. For these reasons, this Court should deny the requested writ.

First, the petition completely mischaracterizes the nature of this case. As petitioner would have it, the "controlling issue" is whether double jeopardy principles bar retrial "of a defendant whose conviction has been reversed for insufficiency of an aggravating element of the crime, if a lesser included crime had been proved beyond a reasonable doubt." Pet. 4. While that question may be an interesting one -- it is not the question presented by this case. The critical fact here, which petitioner ignores, is that the lesser-included crime, at the prosecutor's election, was never even submitted to the jury at trial. The issue in this case, therefore, is whether double jeopardy principles bar retrial of a defendant whose conviction has been reversed for insufficiency of an aggravating element of the crime, where the lesser-included crime was never presented to the jury in the first instance. Those courts that have directly addressed this issue have uniformly held that double jeopardy bars retrial on the lesser-included offense.

Here, the first indictment charged Alfonso Owens with just one count: robbery in the first degree. At trial upon this indictment, the prosecutor made the tactical decision, see N.Y. Crim. Proc. Law § 300.50(1) and (2) (McKinney 1993) (trial court must honor request by either party to submit "lesser included" offense to jury, where supported by "reasonable view of the evidence"), to submit this singular charge to the jury, unaccompanied by the lesser-included offense of robbery in the third degree. Had the jury then acquitted Mr. Owens of first-degree robbery -- the only charge before it -- there can be no doubt but that the guarantee against double jeopardy would have barred recharging Mr. Owens with third-degree robbery. See Brown v. Ohio, 432 U.S. 161, 168-69 (1977) ("invariably true" that greater offense will always be "the 'same' for purposes of double jeopardy as any lesser offense included in it").

Similarly, once the Appellate Division found that the evidence was insufficient to support the only charge before the jury, that court's dismissal of the indictment was tantamount to acquittal of the charge, Burks v. United States, 437 U.S. 1, 19 (1978), and was thus entitled to the same preclusive effect as the decision that, in essence, the appellate court held the jury should have made. See Tibbs v. Florida, 457 U.S. 31, 41 (1982) ("A reversal based on the insufficiency of the evidence has the same effect [as an acquittal] because it means that no rational factfinder could have voted to convict the defendant."). As this Court explained in Lockhart v. Nelson, 488 U.S. 33 (1988):

> Because the Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense, it ought to do the same for the

> defendant who obtains an appellate determination that the trial court should have entered a judgment of acquittal. The fact that the determination of entitlement to a judgment of acquittal is made by the appellate court rather than the trial court should not . . . affect its double jeopardy consequences; to hold otherwise "would create a purely arbitrary distinction" between defendants based on the hierarchical level at which the determination was made.

488 U.S. at 39 (citing Burks, 437 U.S. at 10-11) (emphasis in original). These principles apply in this case. Where, as here, the jury had only one count before it -- which count was not supported by legally sufficient evidence -- double jeopardy principles bar reprosecution for any lesser-included offense.

To be sure, had the jury in fact been presented with both robbery in the first degree and robbery in the third degree, there would have been no bar to reindictment for third-degree robbery following appellate dismissal of the greater offense. Under those circumstances, had the jury rendered a guilty verdict on the higher charge, it would have essentially suspended its deliberations prematurely. Were that charge found (on appeal) to have been lacking in evidentiary support, it would have been entirely proper to retry the defendant on the lesser charge -- placing him in precisely the position he would have been in, had the jury properly disposed of the higher charge and then proceeded to consider the lesser one. See, e.g., People v. Mayo, 48 N.Y.2d 245, 422 N.Y.S.2d 361 (N.Y. 1979) (where defendant was charged with robbery in the first degree, and jury was submitted lesser-included offenses of robbery in the second- and third-degrees, reindictment of defendant for lesser offenses after evidence of greater offense was found legally insufficient did not constitute double jeopardy).

This, however, was not such a case. Here, Mr. Owens was indicted solely for first-degree robbery, and the jury was charged only on that offense. Because it had no authority to even consider the lesser-included offense, the jury was confined to just two choices: guilty of first-degree robbery or outright acquittal. Once the appellate court held that the jury's verdict should have been one of acquittal, double jeopardy principles required that the appellate court's determination be given the same preclusive effect as the jury verdict that should have been rendered in the first place. Lockhart, 488 U.S. at 39.

Those jurisdictions that have addressed this issue have uniformly concluded that the guarantee against double jeopardy bars retrial for a lesser-included offense, not submitted to the jury, following appellate reversal of the greater offense due to insufficient evidence. See Ex Parte Roberts, 662 So. 2d 229, 232 (Ala. 1995); Ex Parte Beverly, 497 So. 2d 519, 524-25 (Ala. 1986); Webster v. State, 549 So. 2d 784, 785 (Fla. 4th Dist. Ct. App. 1989); Granger v. State, 850 S.W.2d 513, 519-20 (Tex. Crim. App. 1993); Stephens v. State, 806 S.W.2d 812, 816-18 (Tex. Crim. App. 1990), cert. denied, 502 U.S. 929 (1991). The key to each of the above decisions is the fact that the jury in the first instance was not charged upon the lesser-included offense.

In Beverly and Stephens, moreover, the courts found it particularly significant that the prosecution -- just like the prosecution in Mr. Owens's case -- "simply chose not to pursue a conviction for [the lesser] offense . . . . [by failing to] request[] the additional instruction." Beverly, 497 So. 2d at 525; see Stephens, 806 S.W.2d at 818 ("[b]y electing to proceed only on the greater offense, the State can

hardly claim that it did not contribute to the error"). See also Saylor v. Cornelius, 845 F.2d 1401, 1408 (6th Cir. 1988) ("no reason why the prosecution should be allowed to try a defendant again merely because it did not realize during the trial that the only theory of liability established by the evidence had not been charged to the jury").

Notwithstanding the above, petitioner cites a string of authorities, both state and federal, purportedly holding that double jeopardy principles do not forbid the reprosecution of a defendant in the circumstances of this case. Pet. 7-8. Yet none of these cases directly addresses the issue at stake here. Indeed, most of the cited authorities are completely inapposite because, unlike the instant case, the juries in those cases were charged with lesser-included offenses at the defendants' first trial, making retrial on such offenses permissible, as discussed above. See Beverly v. Jones, 854 F.2d 412, 415 (11th Cir. 1988) ("jury was instructed on the lesser included offense of murder"), cert. denied, 490 U.S. 1082 (1989); Dickenson v. Israel, 482 F. Supp. 1223, 1224 (E.D. Wis. 1980) ("jury was instructed on the elements of armed robbery and the lesser-included charge of robbery"), aff'd on opinion below, 644 F.2d 308 (7th Cir. 1981); State v. Maupin, 859 S.W.2d 313, 315 (Tenn. 1993) ("the jury was charged on the crimes of aiding and abetting child abuse murder in the first degree, . . . second degree, . . . aggravated child abuse, and . . . child abuse"); State v. O'Brien, 857 S.W.2d 212, 217 (Mo. 1993) (en banc) (jury instructed on murder in first degree and four different theories of murder in the second degree); Gorham v. Commonwealth, 15 Va. App. 673, 426 S.E.2d 493, 494 (Va. Ct. App. 1993) (trial judge "submitted the case to the jury with both felony and

misdemeanor instructions"); People v. Robare, 109 A.D.2d 923, 923-24, 486 N.Y.S.2d 393, 394 (N.Y. App. Div. 1985) (trial court charged jury on robbery in the third, second and first degrees).

Most of the other cases cited by petitioner simply do not disclose, one way or the other, whether the first-trial jury was charged with any lesser offense. See State v. Malufau, 80 Haw. 126, 906 P.2d 612 (Haw. 1995); People v. Youngblood, 210 A.D.2d 948, 621 N.Y.S.2d 265 (N.Y. App. Div. 1994); People v. Sanchez, 209 A.D.2d 265, 618 N.Y.S.2d 770 (N.Y. App. Div. 1994), leave denied, 624 N.Y.S.2d 385 (N.Y. 1995); State v. Garcia, 114 N.M. 269, 837 P.2d 862 (N.M. 1992); State v. Alston, 26 N.C. App. 418, 216 S.E.2d 416 (N.C. Ct. App. 1975).[1/] Because these cases therefore do not address the issue at stake in this case, they obviously fail to take a position contrary to that advanced by the courts below.

Finally, petitioner's citation to People v. Ryan, 82 N.Y.2d 497, 605 N.Y.S.2d 235 (N.Y. 1993), is also unavailing. Although Ryan indeed contemplated the defendant's retrial upon a lesser offense that was not submitted to the jury at the first trial, Ryan never even considered or addressed the question of double jeopardy, much like the first decision of the Appellate Division in this case. See Owens, 203 A.D.2d at 106-07, 610 N.Y.S.2d at 485-87. Nor did it have to, since there would have been no double jeopardy problem unless and until the state exercised its independent judgment to reprosecute. Indeed, that is precisely what happened in this

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1/ Alston is additionally unpersuasive authority because it was decided prior to this Court's holding in Burks that the Double Jeopardy Clause bars retrial following appellate reversal for insufficiency.

case: the very same appellate panel that had earlier given the state "leave to re-present" the charge of third-degree robbery, 203 A.D.2d at 106, 610 N.Y.S.2d at 486, later held -- when squarely presented with the double jeopardy issue -- that reprosecution was forbidden. 642 N.Y.S.2d at 874. In sum, the "fundamental split" alluded to in the petition, Pet. 4, exists only in petitioner's imagination.

Lacking authority for the issue at stake in this case, petitioner cites the Court's recent decision in Rutledge v. United States, ___ U.S. ___, 116 S. Ct. 1241, 1250 (1996), for the proposition that appellate courts "may direct entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense." Pet. 5-6. First of all, Rutledge expressly declined to identify the limits of an appellate court's power "to substitute a conviction on a lesser offense for an erroneous conviction of a greater offense." 116 S. Ct. at 1250. To the extent that Rutledge did condone the practice, moreover, it is clear that the Court contemplated those circumstances in which the jury had been charged with the lesser-included offense at the first trial. See id. at 1250 n.16 (noting that "[a] jury is generally instructed not to return a verdict on a lesser included offense once it has found the defendant guilty of the greater offense").

Rutledge is thus entirely consistent with the notion that double jeopardy principles forbid a reviewing court from entering judgment against a defendant for a lesser-included offense that the jury never had before it. Indeed, this was precisely the holding of the Ninth Circuit in United States v. Vasquez-Chan, 978 F.2d 546 (9th Cir. 1992). Agreeing that appellate entry of judgment for a lesser offense is proper in some instances, that court held, based upon an analysis of the decisions of other

circuits, that among the conditions precedent to the entry of such judgment is that "the jury must have been explicitly instructed that it could find the defendant guilty of the lesser-included offense and must have been properly instructed on the elements of that offense." Id. at 554. Accordingly, "[i]f no such lesser-included offense instruction is given," the court held, "the acquittal (whether at trial or on appeal) on the greater offense precludes a conviction on a lesser offense." Id. at 554 n.5 (parenthetical in original). In the present case, of course, the reviewing court did not simply modify the conviction to one for a lesser offense, but instead remanded the case with leave to initiate an entirely separate proceeding. If double jeopardy principles proscribe the former, see Vasquez-Chan, 978 F.2d at 554 (citing cases), then, a fortiori, they proscribe the latter. See Schiro v. Farley, 510 U.S. 222, 230 (1994) ("the primary evil to be guarded against is successive prosecutions").

Finally, petitioner cites 3 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 24.4(b), at 91-92 (1984), for the proposition that when there has been both a general trial error as well as a finding of sufficient evidence in support of the lesser-included offense, it is proper to remand for retrial on the lesser offense. Pet. 6-7. Again, the problem is that the authority cited does not address the circumstance at issue here -- in which the jury in the first trial has not been instructed on the lesser-included offense. Moreover, the one case cited by LaFave & Israel regarding retrial on a lesser-included offense after appellate reversal, see id. at 92 n.35 (citing Moss v. State, 574 S.W.2d 542 (Tex. Crim. App. 1978)), was subsequently overruled by a case holding that double jeopardy indeed bars retrial for an offense upon which the jury was not instructed in the first proceeding. See

Stephens v. State, 806 S.W.2d 812, 830-31 (Tex. Crim. App. 1990) (McCormick, P.J., dissenting) (faulting majority for overruling Moss).

Petitioner thus fails to procure a single authority, from any jurisdiction, that conflicts with the double jeopardy holding in this case. To the contrary, all jurisdictions that have confronted this issue have resolved it in precisely the same way as have the New York courts here. Far from being "fundamentally split," there is virtual unanimity among the courts that have considered this issue. Because the decision below was both sound and consistent with the unanimous body of precedent, this Court should not grant the requested writ.

Finally, it is not often that an appellate court will reverse a conviction on the grounds that the evidence below was legally insufficient. A mere subset of that already small group are those insufficiency cases in which, at trial, the jury was not even charged on any lesser-included offense. In short, the circumstances of this case arise infrequently, at best. For this reason as well, the Court need not grant the writ.

CONCLUSION

For the foregoing reasons, the requested writ of certiorari should be denied.

Respectfully submitted,

RICHARD M. GREENBERG, ESQ.
Counsel of Record
Office of the Appellate Defender
45 West 45th Street, 7th Floor
New York, New York 10036
(212) 719-0766
Attorney for Respondent

By: Jeffrey A. Udell, Esq.
Of Counsel